Public Prosecutor v Poh Oh Sim

HIGH COURT (SINGAPORE) — MAGISTRATE'S APPEAL NO 291 OF 1988
YONG PUNG HOW CJ
2 NOVEMBER 1990

Criminal Law — Corruption — Attempting to obtain gratification — Inflated quotation coupled with follow-up queries by accused — Whether offence of corruption made out — Prevention of Corruption Act (Cap 104, 1970 Ed), s 6(a)

Criminal Procedure — Appeal — Trial court making finding of fact — Role of appellate court in assessing finding of fact — When appellate court may interfere with finding of trial court — Criminal Procedure Code (Cap 68, 1985 Ed), s 261

Criminal Procedure — Close of prosecution case — Accused electing to remain silent — Parts of prosecution case unexplained — Whether court entitled to convict the accused

The respondent was charged with two counts of corruption. At the conclusion of the prosecution case the respondent was called upon to enter his defence. He elected to remain silent. The district judge found the evidence of the two main prosecution witnesses to be doubtful because of material discrepancies in their evidence. He acquitted the respondent.

Held, allowing the appeal in respect of the second charge and dismissing the appeal in respect of the first:

(1) An appellate court, if it wished to reverse the trial judge's decision, must not merely entertain doubts whether the decision was right but must be convinced that it was wrong.

(2) In respect of the first charge, when the respondent chose to remain silent, it was open to the district judge to consider the credibility of the prosecution witnesses, and if he was not satisfied as to their credibility, it was open to him to come to the conclusion that the charge against the respondent had not been proven beyond a reasonable doubt.

(3) In the case of the second charge, there was clear evidence that an attempt was made by the respondent to obtain a tiling sub-contract for his brother-in-law's company. A written quotation was in fact handed over with a grossly inflated price, and that part of the evidence as to the repeated follow-up queries by the respondent was not seriously challenged. This evidence required explanation and it was incumbent on the respondent to do so. The respondent having declined to do so, the evidence against him remained, and an adverse inference should have been drawn against him.

Cases referred to

1 *Caldeira* v *Gray* [1936] MLJ 137 (refd)
2 *Thomas* v *Thomas* [1947] 1 All ER 582 (refd)
3 *Chia Han Kiat* v *R* [1937] MLJ 261 (refd)
4 *Lee Sang Cheah* v *R* [1946] MLJ 22 (refd)
5 *PP* v *Ma'arif* [1969] 2 MLJ 65 (refd)
6 *Loh Jue Tee & Anor* v *Low Chick Sum* [1989] 3 MLJ 332 (refd)
7 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (folld)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) s 261
Prevention of Corruption Act (Cap 104, 1970 Ed) s 6(a)

Chan Seng Onn (Deputy Senior State Counsel) for the appellant.
B Ganesh for the respondent.

Cur Adv Vult

Yong Pung How CJ: This is an appeal by the public prosecutor against the acquittal of the respondent on two charges of corruption under s 6(a) of the Prevention of Corruption Act (Cap 104, 1970 Ed) ('the Act').

On the first charge (DAC 1487/87) the respondent was charged:

> that you, on a day in August 1986 at Temple Estate Contract I worksite, Singapore, being an agent, namely, a clerk-of-works in the employ of the Housing and Development Board, did corruptly attempt to obtain for yourself a gratification of an unspecified amount from one Choo Chin Mun, the project co-ordinator of Evan Lim & Co (Pte) Ltd, as an inducement for showing favour in relation to your principal's affairs by agreeing to supervise beyond official working hours the work undertaken by the aforesaid Evan Lim & Co (Pte) Ltd in respect of Temple Estate Contract I, and you have thereby committed an offence punishable under s 6(a) of the Prevention of Corruption Act (Cap 104).

On the second charge (DAC 1488/87) the respondent was charged:

> that you, on a day in August 1986 at Temple Estate Contract I worksite, Singapore, being an agent, namely, a clerk-of-works in the employ of the Housing and Development Board, did corruptly attempt to obtain for yourself a gratification, to wit, a tiling works sub-contract at Temple Estate Contract I valued at $986,477.80 (nine hundred eight-six thousand four hundred and seventy-seven dollars and eighty cents) from Evan Lim & Co (Pte) Ltd for Star-Tile General Contractor as an inducement for forbearing to show favour in relation to your principal's affairs by being lenient in the supervision and thereby ensuring that the work in respect of Temple Estate Contract I could go on smoothly, and you have thereby committed an offence punishable under s 6(a) of the Prevention of Corruption Act (Cap 104).

On both charges, the prosecution's case was based almost entirely on the evidence of Choo Chin Mun, the project co-ordinator of the contracting company, whose evidence was corroborated by the evidence of Evan Lim Lam Hong, the managing director of the contracting company, who was also therefore Choo Chin Mun's boss.

In the learned judge's grounds of decision for dismissing both charges against the respondent, it is clear that he formed a poor opinion of these two witnesses. He was greatly influenced in his opinion of them by what he considered to be two material discrepancies in Choo Chin Mun's evidence. In addition, he was critical of the demeanour in court of Choo Chin Mun, and came to the conclusion that he was not a witness of

truth and should be disbelieved. This in turn adversely affected his opinion of the evidence of Evan Lim Lam Hong.

> In the court's view, these discrepancies in Choo's evidence about his boss's reaction and the date he reported the incident to his boss seriously raises the question whether such an incident regarding his conversation with Poh as alleged by Choo actually took place. In the court's view, these discrepancies could not be due to a mere lapse of memory on Choo's part as the evidence were given within a short period of time.
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> In the circumstances, the court had serious doubts whether Choo's evidence that Poh had told him that if Choo could not give this job to his friend 'I don't think we can work smoothly' is true, and that as this pertains to a vital ingredient of the prosecution's case the court accordingly acquitted and discharged Poh of this charge.
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> There is some general final observations which this court must record. Throughout the whole of the prosecution's case the court had closely observed the demeanours of three prosecution witnesses whilst they were giving evidence. These witnesses are Tan Tian Huat, Choo Chin Mun and Evan Lim Lam Hong.
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> ...
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> As regards Choo Chin Mun, reference has already been made to his two material discrepancies earlier by the court. Apart from that, his demeanour also leaves much to be desired. He did not appear to the court to be a frank and honest witness. Indeed, as exhaustive cross-examination in the later stages of the prosecution's case revealed, Choo was found to have been given shares by his boss, Evan Lim, in the company Evan Lim & Co (Pte) Ltd and his answers in cross-examination regarding his interest in Evan Lim & Co (Pte) Ltd appears to the court to be unnecessarily vague and evasive:
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> ...
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> In the court's view, this is most significant and disturbing as this happened about a month after Evan Lim was called up by the Corrupt Practices Investigation Bureau to give a statement regarding this whole episode. It is also significant that by then Poh himself had lodged a report to the CPIB on 12 September 1986 (see exh P12) alleging, inter alia, that Choo had offered a bribe to him on behalf of this boss.
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> Seen in the light of these facts, what is even more disturbing to the court is that both Choo and his boss, Evan Lim, could not agree as to why the said substantial amount of shares were allotted to Choo. Whilst Choo stated under cross-examination that he had been given these shares by Evan Lim and even had the gall to deny that he was grateful to Evan Lim for these shares (at p 206 of notes of evidence), Evan Lim chose not to say why the 150,000 shares were given to Choo. Clearly Choo has an interest to serve, viz that of his boss.

In particular, as will be noted from the above, the learned judge appears to have been over-influenced by what he considered to be the unsatisfactory evidence of these two witnesses on the subject of their shareholdings in the contracting company, which was not strictly relevant to the issues before him, almost to the exclusion of consideration by him of the question before him, which was that of determining the weight of the other evidence relevant to the charges which were before him. In my opinion, this led to serious weaknesses in his findings of fact.

In considering an appeal, an appellate court is bound by s 261 of the Criminal Procedure Code (Cap 68, 1985 Ed) which provides as follows:

> No judgement, sentence or order of a District Court or Magistrate's Court shall be reversed or set aside unless it is shown to the satisfaction of the High Court that the judgment, acquittal, sentence or order was either wrong in law or against the weight of the evidence, or, in the case of a sentence, manifestly excessive or inadequate in the circumstances of the case.

It is also well-settled law that, when a trial judge makes findings of fact based on the credibility of witnesses whom he has had the opportunity to see and assess, an appellate court will generally defer to the conclusion which the trial judge has formed. An appellate court, if it wishes to reverse the trial judge's decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong.

In this connection, counsel for the respondent has also referred the court to the leading cases of *Caldeira* v *Gray*[1] and *Thomas* v *Thomas*[2] which have often been cited in these courts.

But this principle of law, nevertheless, is not absolute and inflexible. The headnote to *Caldeira* v *Gray*[1] itself states:

> ... the appellate court cannot, merely because the question is one of fact, and because it has been decided in one way by the trial judge, abdicate its duty to review his decision, and to reverse it, if it deems it to be wrong.

This is a principle which has long been supported by authorities in our own courts of law and in Malaysia. The appellant's counsel has cited to me some of these local authorities: *Chia Han Kiat* v *R*;[3] *Lee Sang Cheah* v *R*;[4] *PP* v *Ma'arif*;[5] *Loh Jue Tee & Anor* v *Low Chick Sum*.[6]

In this case, the first charge was attempting to obtain a gratification of an unspecified amount. This attempt was made verbally, payment was not in fact made, and apart from the evidence of Choo Chin Mun and Evan Lim Lam Hong, there was nothing to support this charge. At the end of the prosecution case, the respondent was called upon to enter on his defence. He did not do so, and chose to remain silent. It was then open to the learned judge, following the principles in *Haw Tua Tau* v *PP*,[7] to consider the credibility of the prosecution witnesses and, if he was not satisfied as to their credibility, it was open to him to come to the conclusion that the charge against the respondent had not been

proven beyond reasonable doubt. This is what he did. The learned judge having come to this conclusion, the respondent was acquitted. In the circumstances, in reviewing the decision, an appellate court would not be justified to reverse it, and the appeal against the acquittal must be dismissed.

In the case of the second charge, however, there is clear evidence that an attempt was made by the respondent to obtain a tiling sub-contract for his brother-in-law's company. A written quotation ('P7') was in fact handed over with a grossly inflated price, and that part of Choo Chin Mun's evidence as to the repeated follow-up queries by the respondent, as to whether a decision had been made on awarding the sub-contract, was not seriously challenged. The defence suggested that either the contracting company, or Evan Lim Lam Hong as managing director, brought the allegations against the respondent because of the failure of the pile-cap inspection, and because they therefore wanted the respondent to be transferred by the Housing and Development Board from this contract. This could not be so, however, because from the date in the quotation the attempt by the respondent to procure the tiling sub-contract for his relative was made very much earlier.

At the end of the prosecution case, the respondent was called upon to enter on his defence. This meant that the court had found that a case had been made out against the respondent which, if unrebutted, would warrant his conviction. The respondent chose to remain silent. It is true that, even though the respondent had chosen to remain silent, the court could still decide to acquit him if, having then reviewed the evidence against him, the court should come to the conclusion that the case against him was dependent on the evidence of witnesses, and that the credibility of these witnesses had been seriously impugned. In this case, however, there was other evidence, including documentary evidence in the shape of the quotation ('P7'), and the evidence of Wong Shyr Ling, the respondent's assistant, and Leong Sui Lam, a partner of his brother-in-law, all of which needed explaining away, and it was incumbent on the respondent to do so. He having declined to do so, the evidence against him remained, and an adverse inference should have been drawn against him. In my judgment, the evidence on this charge was not adequately considered by the judge and, if it had been, he should have come to a different conclusion, that he was satisfied beyond reasonable doubt. In not doing so, his decision is clearly wrong on the evidence, and should be reversed.

In the circumstances, the appeal on the first charge is dismissed. The appeal on the second charge is allowed, and the acquittal is substituted by a conviction under s 6(a) of the Act. [The court heard the respondent's mitigation plea on 6 November 1990 and sentenced him to six months' imprisonment and to a fine for $10,000, in default another three months' imprisonment.

Appeal on the first charge dismissed; appeal on the second charge allowed.

Solicitors: *Sai Lim & Ganesh.*

Reported by *Mathavan Devadas*